

**Town of Amherst
Zoning Board of Appeals - Special Permit**

DECISION

Applicant: Omnipoint Communications, Inc. c/o Attorney Simon Brighenti
1350 Main Street, Springfield, MA 01103

Date application filed with the Town Clerk: March 31, 2008

Nature of request: Special Permit for a wireless communication facility under Section 3.340.2 of the Zoning Bylaw

Address: 740 Belchertown Road (Map 18D, Parcel 23, R-LD Zoning District)

Legal notice: Published April 30 and May 5, 2008 in the Daily Hampshire Gazette and sent to abutters on April 17, 2008

Board members: Thomas Simpson, Barbara Ford and Albert Woodhull

Submissions: The petitioner submitted the following:

- A set of plans of the design of the proposed communications tower, drawn by Coler & Colantonio, dated 2/16/07;
- Ten photosimulated views of the proposed tower from directly surrounding the landfill, mostly less than ¼ mile, ¾ mile closer that that required of Section 2.j of 3.340.2 of the Bylaw;
- A booklet compiled by Simon Brighenti with four chapters: 1) Application and supporting statements, 2) Project Narrative Description, 3) Radio Frequency Engineer's Affidavit and other legal documents, 4) Zoning drawings.

The Department of Public Works submitted the following:

- A site plan of the 56.16 acres of the former landfill, 2 acres of the current transfer station, and the location of the proposed communications tower, drawn by Paul Dethier, DPW, dated 12/7/07;
- A site locus map, showing the proposed project site in relation to the surrounding area;
- A management plan of the entire landfill area;
- Photos of the transfer station entrance way and two photos of the proposed project location from different angles;
- Two photos of the sight lines from the two most vulnerable properties along Harkness Road that abut the landfill;
- A photo of east Amherst showing the one mile radius area around the proposed site, as required by the Zoning Bylaw, Section 3.340.2 of the Zoning Bylaw.

The zoning assistant submitted memos concerning the current application dated 5/8/08, the Special Permit application for the transfer station dated 9/16/05, and a memo of a similar application for a communications tower on town-owned land in North Amherst, dated 3/3/06.

Two members of the public submitted the following articles from the internet:

- “Town can reject cell phone towers” from Lawyers Weekly USA, dated 2/22/2001.
- “Conclusions of Dr. Neil Cherry from Lincoln University, Canterbury, New Zealand, in his study dated June 8, 2000 on Probable Health Effects associated with Mobile Base Stations in Communities: the need for health studies”:
- “Why we would not want a cell phone tower in our residential community”, undated:
- “For Whom Ma Bell Tolls: Church Cell-phone gets static from locals”, by Meg Shannon, 5/12/08
- Hooksett Banner: “Crowd protests cell phone tower plan, by Susan Ware, 7/18/07;
- “Cell towers in Residential Areas”, by Stuart Lieberman, Reality Times, 8/3/06;
- Probably health effects associated with mobile base station in communities: the need for health studies, Dr. Neil Cherry, New Zealand, June, 2000.

Site Visit: April 24 and May 2, 2008

The Board met with Guilford Mooring, Superintendent of Public Works, Paul Dethier, Landscape Architect from the Town Engineering Department and Mike Kirtell, photographer from Omnipoint, Inc. The first site visit was too windy for the traditional balloon test to show the height of the tower. The balloon test was possible at the second site visit. The Board observed the following at the site visits:

- A large 62 acre site, formerly the Amherst landfill, now currently used as the Amherst Transfer station;
- The border of evergreens along all sides of the landfill and the 125-foot high cells of the landfill that shield much of the activity on site;
- The depressed area next to the cell closest to Belchertown Road where the communication tower is proposed;
- The access roads to the proposed tower location that are part of the transfer station operations, the main public road from Belchertown Road and the private DPW gravel road behind the transfer station to the tower location.
- The screening of the tower location by the landfill cells and the evergreens, plus the 15-25 lower elevation of the location from Belchertown Road and the rest of the landfill site.

Public Hearing: May 15, 2008

(Note that testimony for Special Permit application FY2008.00037 to allow the DPW to have a wireless facility at the transfer station is intertwined with testimony for this application.)

Prior to taking testimony, the Chair of the Zoning Board of Appeals, Mr. Simpson, stated that he had talked with Town Counsel, Joel Bard, about the legal issues in permitting communication towers within the Town. Mr. Bard had re-affirmed the Federal Communications Commission’s (FCC) requirement that a permit for a cell tower must be issued if the applicant demonstrates a lack in service at the proposed location. If coverage is interrupted in the area under consideration for Omnipoint (T-Mobile), then the ZBA must issue a permit for the communications tower.

Having said that, Mr. Simpson stated that the Board will take the public’s concern under consideration, but the law does state that cell phone companies do have the right to erect a tower or co-locate on an existing structure in order to guarantee continuous service in the area.

Attorney Simon Brighenti spoke at the hearing on behalf of Omnipoint Communications, Inc. Radio frequency engineer Elijah Luutu also was present to answer questions about frequencies.

Mr. Brighenti gave the following information:

- Omnipoint is a subset of T-Mobile, Inc; Omnipoint does the permitting, T-Mobile generates the service;
- Wireless communication facilities are regulated by the FCC, the FAA, State, historical, local Conservation Commissions, and local Planning Board or Zoning Boards of Appeal;
- If a tower is 200 feet or higher, it must be registered with the FCC and have a light pole attached to the tower;
- They are asking for a 150-foot tower, so no lighting is needed on the tower;
- Lighting may be needed with the computer equipment at the ground level, but not 24 hours a day;
- The tower will be a standard monopole with some whips on top;
- The elevation of the site is 268 feet; Cell #3 of the landfill next to the proposed site is at 300 feet elevation, a 50-foot difference in height;
- Two-thirds of the tower will be hidden on three sides by Cell #3;
- The tower will be about 155 feet from Route 9, shielded by a row of large white pines;
- Omnipoint will use the existing entrance road to the transfer station, plus the DPW gravel road behind the recycling center;
- The monopole tower will have the standard triangular antennae platform, 11 feet wide on a side;
- The tower area will have three BTS cabinets next to it on a concrete pad, and surrounded by a six (6) foot high chain link fence;
- The DPW will have access to the cabinets and tower for emergencies, and the DPW co-locates their equipment on the tower;
- The tower and the fenced compound will be able to support several carriers;
- There also will be co-axial cable and antenna for the emergency service “911”; 60-65% of all emergency calls are made from cell phones;
- There will be a 10-foot separation on the tower between carriers, the standard distance for communication towers;
- State law cannot require a carrier to provide space for other carriers, but Omnipoint will offer space to others;
- The facility will be a “passive” one, with no employees needed on a regular basis;
- The site will be visited once/month for regularly scheduled readings, adjustments and maintenance;
- The employee will monitor the quality of signals and the frequency of use;
- A small delivery truck will come to the facility to service it;
- As other carriers and T-Mobile get more business, more antennas are needed in the area;
- It’s a quiet facility; there is a about decibels of sound right at the cell tower itself, but beyond the fenced area it cannot be heard;
- There is no noise and no traffic associated with the communication tower;
- Other T-Mobile facilities in Amherst are located at UMass, East Pleasant Street, St. Brigid’s Church, and near the Notch;
- In the area, there is a facility on a church tower near Smith College, on a tower at Mt. Holyoke College, in Belchertown and may be one on a hotel roof in Hadley;
- With the level of service in Amherst, there needs to be another facility; a new facility along Route 9 east of the Town center would fill in the existing gap in service;
- Wireless coverage is a community need; there is co-operation as well as competition among carriers;
- The concept behind the FCC 1996 Act was to recognize the popularity of communication needs; the Act states: (1) Towns cannot prohibit, (2) they cannot discriminate among carriers, or (3) prohibit a location;
- The application process prior to the ZBA hearing is under MEPA. T-Mobile must notify statewide

the Mass. Historical Commission, the Naraganset Indians, the Stockbridge Indians and the Wampanoag Indians; the project was fine with all state groups;

- Locally, a wetlands delineation was made (no wetlands), the Design Review Board voted to recommend the facility, and a presentation was made before the Planning Board (no vote taken).

Several members of the public spoke to the petition:

- Francesca Brinshika, 85 Belchertown Road, asked why T-Mobile cannot co-locate with other carriers in another location. The applicant responded that each carrier operates at a different frequency. There are other carriers at the Amherst College smokestack, but it is not strong enough to hold another carrier. T-Mobile was given a Special Permit from the ZBA for a facility on the roof of the science building at Amherst College, but some of the scientists felt it would interfere with their work, and permission was taken away.
- James Best, 186 Harkness Road, claimed that the proposed tower will be visible from his back yard and that abutters should not be subjected to this. He said that it would be a visually offensive structure and violates Section 10.382 of the Zoning Bylaw. Mr. Best said that he could listen to his radio with interference, so why need a cell tower? The applicant responded that all carriers have separate frequencies, so that radio frequencies would be different than cell phone frequencies;
- Elsie Fetterman, 148 Logtown Road, objected to the process for the permit application. She said that the tower will be in her back yard and is not suitably located in the neighborhood (Section 10.381 of the Zoning Bylaw). She said that she was informed about the first site visit but not the second one when the balloon was flown. She also wondered if the ZBA can set the height of the tower. Mr. Simpson responded that the ZBA has the authority to increase the height stated in the Zoning Bylaw (125 feet) via a waiver from that regulation;
- Ben Zagradnik, 85 Belchertown Road, said that he has a cell phone and excellent reception (he did not say which company he uses). He said that law suits have denied cell towers in particular neighborhoods and handed the Board an article obtained from the internet concerning one particular lawsuit. He further claimed that it was not in the ZBA's purview to issue a Special Permit to T-Mobile. He said there are health concerns about radiation and ongoing research about it. He also said that one of the articles he submitted said that if there is a perceived health risk, that property values will go down.

Mr. Simpson responded that unfortunately neighborhood concerns have been trumped by the Federal Telecommunications Act in this case, giving communications companies the right to located if they have insufficient coverage in the area. A local Zoning Bylaw can be superseded by State law, Federal law, farms, comprehensive permits and some environmental concerns; it is not ironclad. The 1966 FCC Act does supersede the Amherst Zoning Bylaw, Section 10.38, findings required of all Special Permits.

Elijah Luutu, engineer for Omnipoint spoke to several questions concerning signal frequencies:

- T-Mobile transmits at a low power (1900 megahertz) and can transmit clearly for about 1 ½ miles;
- A cell phone frequency would not interfere with radio or television reception;
- Each carrier is responsible for his own equipment;
- There is minimum exposure to radiation; it is less than 1% 400 feet from the tower
- Weaknesses in the signal are determined two ways, by drive-by tests and by computer generation of the signal interacting with the environment, plus the demand for use; the signals charts generated by Omnipoint show a clear lack of signal along Rout 9 in Amherst;
- Each carrier goes through a similar technique to determine the strength of a signal; some carriers differentiate between inside and outside a building, but all tweak the numbers according to the topography of the location (hills, buildings, etc.).

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Mr. Woodhull added that there is free software available on the internet to determine the strength of a signal in an area, dependent on where the transmitter is and the geography of the surroundings.

Mr. Simpson said that the ZBA would require the power and frequency of the signal currently on the area and what it would be if the tower and antennas were built.

Mr. Brighenti said that the Telecommunications Act cannot regulate environmental or health concerns and the FCC is continually studying this. Five years ago a study for the State was conducted, and all reports showed that radiation was 5-7% of the minimum allowed use. In fact, the radiation was so low from communication towers that it is not regulated any more.

Mr. Brighenti also said that property valuation studies with a cell tower nearby have been conducted in Western Massachusetts. The level of acceptance for towers has grown every year. Strong cellular service, especially in hilly terrain, is considered a plus for property values. Nearby places where this has been shown have included Southampton, Northampton and areas in the Berkshires. Having strong cellular service is looked on as a safety issue as well.

Mr. Zagradnik said that a Guardian article from 2003 said the opposite – that property values decrease with a cellular tower in the area.

Mr. Simpson stated that the Zoning Bylaw requires that carriers co-locate whenever possible, but all carriers must go through the Special Permit process in order to do so. Public notice will again be given, and all carriers have to prove their case to the ZBA.

Mr. Mooring said that Omnipoint's photo simulations were made before the balloon test, showing the exact location and height of the proposed tower. Therefore, the photo simulations for location were not 100% accurate all of the time.

Mr. Mooring said that the DPW has no problem with locating a communications tower at the proposed location. There is a screening and fencing all around the perimeter of the landfill, and the tower site will have a six-foot fence around it.

Mr. Simpson confirmed that the tower will be grey in color, as will the Omnipoint cabinets located behind their fenced area.

Mr. Simpson asked about backup power. The applicant said that a battery pack is provided which is checked regularly. The battery will provide 4-6 hours of service with a failure. Mr. Simpson responded that this is not adequate. There should be significant back-up capacity, such as a generator. The applicant agreed that they would provide a generator.

Mr. Mooring stated that if the Town co-locates, they will install their own generator for back-up. They would not rely on a battery pack. They may locate the generator in the DPW building.

Mr. Woodhull noted that telecommunication carriers lease land lines from telephone services such as Verizon. Power outages depend on electric company service, but cell phone carriers are connected to the telephone company independent of the electric company.

Ms. Ford noted that at a height of 150 feet, the tower could co-locate three other companies in addition to T-Mobile. The applicant confirmed this, but said that there are only 3 or 4 carriers in the area to date.

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Mr. Mooring said that the DPW would be able to communicate from the landfill area to the DPW building, to the bunker at the notch and to the Ruxton site. This would improve their communication and service to the Town significantly.

Mr. Simpson made a motion to continue the hearing to July 10, 2008 at 7:30 pm. Ms. Ford seconded the motion and the vote was unanimous to continue the hearing to July 10, 2008, 7:30 pm.

Public Meeting:

Mr. Simpson made a motion to modify Condition #2 of Special Permit FY2006-00009 to allow the Town to lease part of the landfill/transfer station site to a wireless communication facility. Ms. Ford seconded the motion, and the vote was unanimous to so modify Condition #2 of Special Permit FY2005-00009.

Mr. Simpson said that determination of findings and conditions of the Special Permit would be held at a public meeting of the Board at a later time. Since the Special Permit application by Omnipoint was continued to July 10th, it was agreed that findings and conditions would be made at that time.

Findings:

The Board finds under Section 10.38 of the Zoning Bylaw, Specific Findings required of all Special Permits, that:

10.380 and 10.381 – The proposal is suitably located in the neighborhood and is compatible with existing uses because

10.382 and 10.385 – The proposal would not constitute a nuisance and reasonably protects the adjoining premises against detrimental or offensive uses on the site because

10.383 and 10.387 – The proposal would not be a substantial inconvenience or hazard to abutters, vehicles or pedestrians and the proposal provides convenient and safe vehicular and pedestrian movement within the site and in relation to adjacent streets because

10.384 – Adequate and appropriate facilities would be provided for the proper operation of the proposed use because

10.386 – The proposal ensures that it is in conformance with the Parking and Sign regulations of the town because

10.389 – The proposal provides adequate methods of disposal and/or storage for sewage, refuse, recyclables and other wastes because

10.391 – The proposal protects unique or important natural, historic or scenic features because

10.392 – The proposal provides adequate landscaping, including the screening of adjacent residential uses, because

10.393 – The proposal provides protection of adjacent properties by minimizing the intrusion of lighting because

10.395 – The proposal does not create disharmony with respect to the use, scale and architecture of existing buildings in the vicinity because

10.397 – The proposal provides adequate recreational facilities, open space and amenities for the proposed use because

10.398 – The proposal is in harmony with the general purpose and intent of the Zoning Bylaw because it protects the health, safety, convenience and general welfare of the inhabitants of the Town of Amherst.

Public Meeting – Zoning Board Decision

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For all of the reasons stated above, the Board VOTED _____ on the premises at
_____ address _____, (Map _____/Parcel _____, _____ Zone), with conditions.

BOARD CHAIR

BOARD MEMBER

BOARD MEMBER

FILED THIS _____ day of _____, 2008 at _____,
in the office of the Amherst Town Clerk _____.

TWENTY-DAY APPEAL period expires, _____ 2008.
NOTICE OF DECISION mailed this _____ day of _____, 2008
to the attached list of addresses by _____, for the Board.

NOTICE OF PERMIT or Variance filed this _____ day of _____, 2008,
in the Hampshire County Registry of Deeds.

Town of Amherst
Zoning Board of Appeals

SPECIAL PERMIT

The Amherst Zoning Board of Appeals hereby grants a Special Permit to _____ on the premises located at _____ address _____, (Map _____/Parcel _____, _____ Zone) as requested in the application filed by _____, subject to the following conditions:

BOARD MEMBER, Chair
Amherst Zoning Board of Appeals

DATE